No. 12257

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

EDWARD R. BIGGS, JOHN R. HECTOR, H. J. LUEDER and MARTIN M. MORENO,

Appellants,

vs.

JOSHUA HENDY CORPORATION,

Appellee.

APPELLANTS' OPENING BRIEF

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APPELLANTS' OPENING BRIEF

I.

Statement of Basis of Original and Appeal Jurisdiction.

This action was filed pursuant to the provisions of Section 16(b) of the Fair Labor Standards Act of 1938, hereinafter sometimes referred to as the Act.[1] Jurisdiction vested in the District Court by that section and by section 24 (8) of the Judicial Code (28 U. S. C., Section 41 (8)). Section 2 of the Portal-to-Portal Act of 1947[2] did not withdraw jurisdiction of the claims of the appellants herein.

This court has jurisdiction of the appeal under the provisions of Section 128 of the Judicial Code (28 U. S. C., Section 225).

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[1]Public No. 718, 75th Cong., Chap. 676, 52 Stat. 1060-1069 (1938), 29 U. S. C., Secs. 201-219.

[2]Pub. Law 49, 80th Cong., Chap. 52.

II.

Statement of the Case.

The question involved in this appeal[3] is the following: Was the employer entitled to take credit for the extra compensation paid to employees for their regular hours on the swing shift and graveyard shift against the overtime compensation due them for the half hour lunch periods which they worked?

This issue is raised by Finding of Fact No. 5 [Tr. p. 17], setting forth the pertinent provisions of the collective bargaining agreement, Finding of Fact No. 6 [Tr. p. 20], finding that the plaintiffs, including these appellants, received no compensation for the half hour lunch periods, Finding of Fact No. 7 [Tr. p. 21], finding that each of the appellants was on duty and performed services for the appellee during his lunch periods, Conclusions of Law Nos. 6 and 7 [Tr. pp. 24 and 25], concluding that the appellee was entitled to credit against the half hour lunch periods worked by the appellants by reason of the shift differentials paid to said appellants, and by the judgment [Tr. p. 26] which denies these appellants compensation for their half hour lunch periods worked upon the swing and graveyard shifts.

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[3]No attempt is made here to set forth the question raised by the cross-appeal.

III.

Statement of Facts.

Appellants were employed by appellee, Joshua Hendy Corporation, then known as California Shipbuilding Corporation, in its shipbuilding yard at Wilmington, California, in various occupations necessary for the production of ships [Tr. p. 7]. The ships built by this yard were, upon completion, delivered to the United States Maritime Commission, and thereafter were sent from the State of California to points outside the State of California [Tr. p. 7].

The appellants were required, by their employer, to perform duties during their regular lunch periods which the collective bargaining agreement set aside for all employees. During such lunch periods they were not excused or relieved from their duties for the purpose of taking lunch or otherwise, and each of them performed the duties for which they were hired during such lunch periods [Tr. p. 21; p. 57 *et seq.;* p. 66 *et seq.;* p. 79 *et seq.;* p. 103 *et seq.*].

The appellants were employed on the swing (second) shift and graveyard (third) shift.[4]

The collective bargaining agreement governing the employment of the appellants by the appellee contained the

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[4]For a portion of his employment, Appellant Hector was employed on the day shift and recovered a judgment in this action based upon the time worked while employed on the day shift. No issue is raised by this appeal concerning this portion of the judgment.

following provisions defining the shifts and providing for extra compensation on account of swing shift and graveyard shift work:

"5. Shift work.

". . .

"(c) First or regular daylight shift: An eight and a half (8½) hour period less thirty minutes for meals on the employee's time. Pay for a full shift period shall be a sum equivalent to eight (8) times the regular hourly rate with no premium.

"Second Shift: An eight (8) hour period less thirty minutes for meals on employee's time. Pay for a full second shift period shall be a sum equivalent to eight (8) times the regular hourly rate plus ten per cent (10%).

"Third Shift: A seven and one-half (7½) hour period less thirty minutes for meals on employee's time. Pay for a full third shift period shall be a sum equivalent to eight (8) times the regular hourly rate plus fifteen per cent (15%).

"(d) For work on any shift less than the full shift period, pay shall be the corresponding proportionate part of the pay for the full shift period, provided such amount be not less than the minimum pay prescribed in Paragraph 10 hereof."

The day shift began at 8:00 a.m. and terminated at 4:30 p.m. The swing shift began at 4:30 p.m. and continued until 12:30 a.m. The graveyard shift began at 12:30 a.m. and ended at 8:00 a.m. [Tr. p. 151]. In accordance with the contract, the appellee paid to em-

ployees working on the swing shift additional compensation equal to 10% of the base rate plus one half hour. Employees on the graveyard shift received extra compensation equal to 15% of the base rate plus one hour.[5] Prior to November 19, 1944, the employees' time cards showed their rates of pay as being the base rates plus the percentage differential. In computing their weekly compensation the timekeeping department added the time differential as "allowed hours" [Tr. pp. 151-152].[6] After November 19, 1944, the appellee "ballooned" the rates by including the time differential [Tr. p. 152]. The result was that the employees' time cards following November 19, 1944, reflected the true rate of pay at which each of them was employed.

This change represented merely an accounting or bookkeeping change and did not reflect any change in the employees' wages [Tr. pp. 156-157]. For example, Hector's time card rate prior to November 19, 1944, was shown as $1.725 per hour, and after November 19, 1944, as $1.971

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[5]Hereafter, for convenience and simplicity, both the percentage premiums of 10% and 15% respectively and the time premiums of one half hour and one hour respectively, will be referred to as "shift differentials" unless the context requires that the particular type be specified.

[6]Irwin's testimony indicates that the time card rate was exclusive of both the percentage and the time differential, but a simple mathematical computation establishes that the percentage was included. For example, Hector's time card rate of $1.725 is "ballooned" to $1.971 time card rate by adding one hour, thus: $1.725 \times 8 = 13.800 \div 7 = 1.971$. His "base rate" was $1.50.

per hour [Deft. Ex. E(1)]. Actually he received both before and after November 19, 1944, for each hour of work for which he was credited, the $1.971 rate shown after that date [Tr. pp. 155-156].

This "ballooning" was to make it appear that higher rates were being paid, even though the rates were actually the same, so that employees would be attracted to seek employment with appellee [Tr. p. 157].[7]

The sole function of the shift differential was to serve as an inducement to work the undesirable hours [Tr. pp. 157-158].

They were not given as compensation for any hours which an employee might be required to work beyond his regularly designated shift hours [Tr. p. 158].

IV.

Summary of Argument.

The shift differentials were paid solely by way of inducement to work undesirable hours and were paid only for the hours credited to the employees. They were not paid for time which was not worked. They were not paid as compensation for hours which employees were required to work beyond their regularly designated shift hours. They were not paid as overtime. Accordingly, they could not be offset against overtime but served to increase the "regular rate" computed by including the shift differential.

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[7]The employer could not legally raise the wages because of War Manpower Commission Regulations.

V.

Argument.

1. The Shift Differentials Were Not Overtime Payments.

The Supreme Court has defined overtime premium as "extra pay for work because of previous work for a specified number of hours in the work week or work day."[8]

> *Bay Ridge Operating Co. v. Aaron* (1948), 334 U. S. 446, 465.

Obviously, neither of the differentials paid to employees on the swing and graveyard shifts were paid by reason of the number of hours previously worked by them during the work week. By the express terms of the contract, the employees received those differentials if they worked only one or two hours in the week [Pltf. Ex. 1, Par. 5 (d); see Tr. p. 20].

This precise point was considered and determined by the Supreme Court in the *Bay Ridge* case where the Court said:

> "* * * A mere higher rate paid as a job differential or as a shift differential or for Sunday or holiday work is not an overtime premium." (334 U. S. 446, 465.)

In that case the Court gives the example of watchmen on the day shift and the night shift, indicating that the extra pay, even though it might be time and one-half the rate of the day watchmen, which the night watchmen receive, is the regular rate. It is extra pay for undesirable hours,

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[8]Unless otherwise specifically indicated, the word "overtime" will be used in this brief as so defined.

simply a shift differential. It would not be overtime premium pay but would be included in the compensation of the "regular rate" for determining overtime premium for any excess hours.[9]

Bay Ridge Operating Co. v. Aaron (1948), 334 U. S. 446, 468-469.

2. Shift Differentials Are Part of the Regular Rate of Pay and Cannot Be Claimed as an Offset Against Overtime Compensation Due.

Since the additional sums which are paid, as in this case, for work during undesirable hours do not constitute "overtime" within the meaning of the Fair Labor Standards Act, they must be included in the determination of the "regular rate" for the purpose of computing overtime compensation due under Section 7 of the Act.

Bay Ridge Operating Co. v. Aaron (1948), 334 U. S. 446;

Cabunac v. National Terminals Corp. (C. C. A. 7th, 1944), 139 F. 2d 853;

Roland Electrical Co. v. Black (C. C. A. 4, 1947), 163 F. 2d 417;

Walling v. Wm. Schollhorn Co. (D. C. Conn., 1944), 54 Fed. Supp. 1022;

Ferrer v. Waterman S. S. Corp. (D. C. Puerto Rico, 1947), 70 Fed. Supp. 1 (rehearing granted on other grounds, 76 Fed. Supp. 601);

Burke v. Mesta Machine Co. (D. C. Pa., 1948), 79 Fed. Supp. 588.

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[9]This has consistently been the position of the Administrator of the Wage-Hour Division. See, Opinion Letters: August 17, 1945, referred to C. C. H. Labor Law Service ¶ 25,540.69; August 30, 1948, *Ibid.* ¶ 25,540.693; March 5, 1942, *Ibid.* ¶ 25,540.651.

It follows, of course, that if such extra compensation is to be included in the "regular rate" of pay, it, as well as the "base rate," is the compensation due the employee for each hour which he works. If the employee is entitled to his base rate and his extra compensation as shift differential for each hour which he works, then the employer cannot require him to work additional hours without compensation on the theory that the shift differential pays for such extra hours.

In the case at bar, it was never intended or contemplated by the parties, and nothing contained in the contract or the method of operation thereunder can give any inference, that the shift differentials were designed as a "cushion" on the basis of which the employer could claim additional hours of work beyond those established in the contract without paying for them. Indeed, the contract makes it very clear that for any work performed over and above the stipulated contract hours, the employer would be required to pay additional compensation at the rate of time and one-half [Pltf. Ex. 1, par. 4].

In this case the "regular rate" of the employees, whether on day shift, swing shift or graveyard shift, is determined by dividing the wages actually paid to them, exclusive of overtime, by the hours actually worked in any work week.

> *Bay Ridge Operating Co. v. Aaron* (1948), 334 U. S. 446, 459-460.

For example, Hector's regular rate is computed as follows: 8 hours × base rate of \$1.50 = \$12.00 ÷ 7 hours on third shift = \$1.714 + 15% or .257 = \$1.971. This is precisely the formula which the employer here used to determine the employees' regular rate [Tr. p. 152, Deft. Ex. E(1)].

3. The Decision in Mills v. Joshua Hendy Corp.

In *Mills v. Joshua Hendy Corp.* (1948), 169 F. 2d 898, this Court stated that the additional compensation per week paid by the employer pursuant to the contract to an employee on the graveyard shift could be offset against the additional one and one-half hours per week which the employer required Mr. Mills to work without compensation.

Upon the basis of the following considerations, we respectfully submit that this holding is contrary to controlling law, is not sound in principle, and should be overruled.

The record in the *Mills* case reveals that the employer did not question the correctness of the District Court's ruling which allowed additional compensation for the graveyard shift work on the basis here urged. Accordingly, neither counsel for the employer nor counsel for the employee discussed the problem in their briefs nor argued it orally before the Court. While it is true that in a petition for rehearing the employee therein pointed out to this Court that its decision was in conflict with the decision of the Supreme Court in *Bay Ridge Operating Co. v. Aaron, supra,* a rehearing was not granted and counsel did not have the opportunity of arguing the conflict between the two holdings. The decision is also in conflict with the decisions cited *supra* page 8, and the opinions of the Administrator of the Wage-Hour Division, cited in Footnote 9. Counsel is aware of no decision allowing such credit under these facts.

Furthermore, in principle, the employer would only be entitled to claim an offset if the extra compensation were "excess" payment and not part of the regular rate. If it

was paid as part of the regular rate, then a proportionate part thereof was due to the employee for each hour he worked. If it was due to him for each of his regularly scheduled hours of work, the employer could not claim it as an offset. In both the *Mills* case and in the case at bar, the employer and employee stipulated that the shift differential was part of the regular rate of pay.

To follow the *Mills* holding to its logical conclusion, the employer would, on the theory that the extra pay was "excess" compensation, be not only entitled to offset it against overtime but would be entitled to judgment against the employee for the balance.

In *Mills,* the Court stated that it appeared "that Mills received for his 45 hours work in each week on the graveyard shift pay for 40 hours straight time and 8 hours overtime, or, compensation in each week of 2½ hours of straight time for which he did no work and was not on the job, and ½ hour overtime for which he did no work and was not on the job. Appellant should not be required to *again* compensate for work not performed."

The facts clearly establish, however, and the parties stipulated that Mills did not receive any compensation for hours in which he did no work and was not on the job. On the contrary, the 2½ hours straight time and the ½ hour overtime of which the Court spoke were in that case, and are in this case, compensation for the regular hours of work which the employee was scheduled to and did perform. The employee *did not* receive compensation for work not performed. Since this question was not raised by the parties in the *Mills* case, the record there did not perhaps establish as clearly as it does here that none of the employees received any compensation what-

soever for work not performed. No other inference can be drawn from the stipulation of the parties as to the regular rate of pay, and indeed Mr. Irwin, the employer's own witness, testified that none of the employees received compensation for work not performed.

> "Q. No. I am asking you, Mr. Irwin, about these shift premiums, the percentage premium and the time premium. Neither of those premiums were given a man to compensate him for any hours he might be required to work beyond his designated shift, were they? A. No." [Tr. p. 158.]

For the foregoing reasons, the differentials are not available to the employer as an offset but must be included in the regular rate of pay. Accordingly, we respectfully urge this Court to overrule that portion of the decision of *Mills v. Joshua Hendy Corp.* which held the employer entitled to credit this payment against overtime compensation due.

4. The "Overtime on Overtime" Act of 1949.

Following the decision in *Bay Ridge Operating Co. v. Aaron* (1948), 334 U. S. 446, Congress enacted the so-called "Overtime on Overtime" Act.[10]

This law added sub-section (e) to Section 7 of the Fair Labor Standards Act of 1938 as follows:

> "(e) For the purpose of computing overtime compensation payable under this section to an employee—
>
> (1) who is paid for work on Saturdays, Sundays, or holidays, or on the sixth or seventh day of the work week, at a premium rate not less than one and

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[10]Public Law 177, Chapter 352, 81st Congress, 1st Session.

one-half times the rate established in good faith for like work performed in nonovertime hours on other days, or

(2) who, in pursuance of an applicable employment contract or collective bargaining agreement, is paid for work outside of the hours established in good faith by the contract or agreement as the basic, normal, or regular workday (not exceeding eight hours) or workweek (not exceeding forty hours), at a premium rate not less than one and one-half times the rate established in good faith by the contract or agreement for like work performed during such workday or workweek,

the extra compensation provided by such premium rate shall not be deemed part of the regular rate at which the employee is employed and may be credited toward any premium compensation due him under this section for overtime work."

While this section is too new to have case law interpreting it, there is available for consideration the interpretations of the Administrator of the Wage Hours Division, U. S. Department of Labor.[11] As the Supreme Court has held, these opinions, while not binding upon the court, are persuasive and are entitled to great weight.

U. S. v. American Trucking Assn., 310 U. S. 554.

The Administrator points out that the Amendment is concerned only with certain premium payments that meet the requirements of the new Section 7 (e) but does not

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[11] Where reference is made in this section to the Administrator's opinion, the same is found in Section 778.1, Title 29, Chapter V, Subchapter B, as published in the Federal Register, August 11, 1949.

soever for work not performed. No other inference can be drawn from the stipulation of the parties as to the regular rate of pay, and indeed Mr. Irwin, the employer's own witness, testified that none of the employees received compensation for work not performed.

> "Q. No. I am asking you, Mr. Irwin, about these shift premiums, the percentage premium and the time premium. Neither of those premiums were given a man to compensate him for any hours he might be required to work beyond his designated shift, were they? A. No." [Tr. p. 158.]

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While this section is too new to have case law interpreting it, there is available for consideration the interpretations of the Administrator of the Wage Hours Division, U. S. Department of Labor.[11] As the Supreme Court has held, these opinions, while not binding upon the Court, are persuasive and are entitled to great weight.

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---

[11]Where reference is made in this section to the Administrator's opinion, the same is found in Section 778.1, Title 29, Chapter V, Sub-chapter B, as published in the Federal Register, August 11, 1949.

otherwise affect the applicability of the judicially established principles in reference to overtime compensation.

Under this Amendment, we are not concerned with the first type of "extra compensation," that is, payments for Saturday, Sunday, holidays, or on the sixth or seventh day of the work week. The payments involved here were payments for every hour the employee worked no matter on which day of the week.

With respect to the "extra compensation" described in the second sub-paragraph of the Amendment, the first question is whether or not the premium here involved was for work "outside of the hours established in good faith by the contract or agreement as the basic, normal or regular work day." In this case the employer maintained a 24 hour continuous operation. By the terms of the contract these 24 hours were divided into 8, 7½ and 7 hour shifts (each shift having, theoretically, a one-half hour lunch period). Each shift, therefore, was the "basic, normal or regular work day" for the employees on that particular shift.

In the *Bay Ridge* case, the Government argued that "regular working hours," meaning the day shift, established the straight time rate. In rejecting this argument, the Supreme Court pointed out its obvious defect in that it treated of the entire group instead of the individual workmen. "The straight time hours can be the regular working hours only to those who work in those hours. The work schedule of other individuals in the same general employment is of no importance in determining regular working hours of a single individual" (page 473). In other words, the "regular work day" consists of the hours which each employee is regularly scheduled to work.

Inasmuch as Congress had this decision in mind in enacting the foregoing Amendment to Section 7, it can only be concluded that Congress intended "regular work day" to mean the hours regularly established for any particular employee. In this case, therefore, the swing shift and the graveyard shift were the "basic, normal or regular work day" within the meaning of Section 7 (e) of the Act for the appellants who normally worked those shifts.

Since, therefore, the extra payments here involved were not additional compensation for work outside of the hours established as the regular work day, the employer is not entitled to credit them against overtime compensation due by virtue of this Amendment.

There exists still another reason why the employer cannot claim this credit. The same sub-section of the Act requires the extra payment to be "at a premium rate not less than one and one-half times the rate established in good faith by the contract or agreement for like work performed during such work day or work week." Neither the percentage differential nor the time differential nor the two of them combined when added to the original basic rate amounted to a premium rate of not less than one and one-half times the basic rate.[12]

As the Administrator stated in the opinion above referred to:

> "Where the premium rate is less than one and one-half times such nonovertime rate of pay, the extra compensation provided by such rate must be

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[12]In Hector's case, the time differential amounted to 21.4¢, the percentage to 25.7¢. A "premium rate not less than one and one-half times" his base rate would be an additional 75¢ or a total of $2.25 instead of $1.971.

> included in determining the employee's regular rate of pay, and cannot be credited toward statutory overtime compensation due, unless it qualifies as a true overtime premium under the principles announced in the *Bay Ridge* decision. * * *"

Accordingly, since the shift differetials here involved were not "true overtime premiums" under the principles announced in the *Bay Ridge* decision, since they were not paid for work outside of the basic, normal or regular work day and since they were less than one and one-half times the basic rates of pay, nothing contained in Section 7 (e) permits the employer to offset the shift differentials against earned overtime compensation.

5. Appellants' Counsel Are Entitled to Further Attorneys' Fees on Appeal.

It is the function of this Court to fix a reasonable sum as the value of the legal services rendered to the appellants by their counsel upon this appeal.

> *E. H. Clarke Lumber Co. v. Kurth* (C. C. A. 9, 1945), 152 F. 2d 941;
>
> *Republic Pictures Corp. v. Kappler* (C. C. A. 8, 1945), 151 F. 2d 543;
>
> *Stanger v. Vocafilm Corp.* (C. C. A. 2, 1945), 151 F. 2d 894.

Counsel for appellants respectfully request that an order be made that appellee be required to pay an additional sum in an amount to be determined by the Court for the services of appellants' attorneys on this appeal.

Conclusion.

The appellants have established that the shift differentials involved herein were not true overtime payments under the principles laid down by the Supreme Court. They were, on the contrary, extra compensation paid because of the disagreeable hours. As such, they were part of the compensation paid to each of the appellants for the hours which appellants were regularly scheduled to work. They, therefore, became a part of the regular rate of pay.

That portion of the decision in *Mills v. Joshua Hendy Corp.* which deals with the time differential paid to graveyard shift employees does not take the foregoing facts into consideration. It erroneously concluded that the time differential was paid for hours not worked. In this case, the testimony shows clearly, the Court found, and indeed the effect of the parties' stipulation was that none of this extra compensation was for time not worked but was paid for the regularly scheduled hours actually worked. This portion, therefore, of the *Mills* decision should be overruled.

The shift differentials here involved are not the extra compensation which the Section 7 (e) amendment to the Act permits to be treated as overtime compensation for the purpose of computing the regular rate of pay.

It is respectfully submitted, therefore, that under the principles established by the Supreme Court in *Bay Ridge Operating Co. v. Aaron, supra,* the facts presented to this

Court entitle the appellants herein to judgment for the additional hours which they worked during their lunch periods on the swing and graveyard shifts and for which they received no compensation whatsoever.

Respectfully submitted,

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